

Government Information (Public Access) Act 2009

NOTICE OF DECISION

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| File Ref: | 2023/346 |
| Decision-maker: | Dr Kate Cumming, Manager, Archives and Records Management Services |
| Date of decision: | 12 April 2023 |

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2023/346

1. Summary of access application

The University of Sydney (**the University**) received your access application under the *Government Information (Public Access) Act 2009* (**the GIPA Act**) on 20 January 2023. On 30 January 2023 the University advised you that your application was not a valid application because the description of the information you sought access to was not sufficient for the University to identify the information you requested. We invited you to reframe your application in order to make it a valid application.

On 30 January 2023 you responded and on 1 February 2023 you submitted a reframed application. We inadvertently overlooked this response. On 1 March 2023 you inquired as to the status of your application. On 2 March 2023 we apologised for our mistake, advised you that our inaction constituted a

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deemed refusal of your application and advised you of your appeal rights. We told you that we would continue processing your application and make a late decision on it as soon as possible. On 2 March 2023 you agreed to this approach, while also advising us of your concerns and potential pathways for escalating these concerns.

On 24 March 2023 we advised you that your application, as it stood, was such that dealing with it would likely require an unreasonable and substantial diversion of the University's resources. We invited you to re-scope your application. On 29 2023 March you responded with a revised request. The final form of your application is:

I request all email correspondence (including threads and attachments) from/to/cc Professor Edward Holmes between December 2019 and July 2020, containing one or more of the following keywords:

Pangolin
GX/P1E
GX/P4L
GX/P5L
RmYN02
ZC45 RaTG13

2. Decision

I am authorised by the principal officer, for the purposes of section 9(3) of the GIPA Act, to decide your access application.

I have decided under section 58(1)(d) of the GIPA Act to refuse to provide access to the information because there is an overriding public interest against its disclosure.

In this Notice of Decision I will explain my reasons. To meet the requirements of section 61 of the GIPA Act, I need to tell you:

- (a) the reasons for my decision and the findings on any important questions of fact underlying those reasons, and
- (b) the general nature and format of the records containing the information you asked for, with reference to the relevant public interest considerations against disclosure (see the attached Schedule of Documents).

2.1. Reviewable Decision

This decision is reviewable under section 80(d) of the GIPA Act.

3. Searches for information

Under the GIPA Act, we must conduct reasonable searches for the government information you asked for in your application.

The University's Cyber Security team extracted from the email account of Professor Edward Holmes all emails from or to Professor Holmes, including emails to him as cc, between December 2019 and July 2020 that contained any of the seven keywords outlined in your revised application.

The search identified 1446 email chains plus attachments.

4. The public interest test

Under section 9(1) of the GIPA Act, you have a legally enforceable right to access the information you asked for, unless there is an overriding public interest against its disclosure.

Further, under section 5 of the GIPA Act, there is a presumption in favour of disclosing government information unless there is an overriding public interest against its disclosure.

To decide whether or not there is an overriding public interest against disclosure of the information you asked for, I applied the public interest test, which is set out in section 13 of the GIPA Act.

I applied the public interest test by:

- (a) identifying any public interest considerations in favour of disclosure;
- (b) identifying any relevant public interest considerations against disclosure; and (c) deciding where the balance between them lies.

I did this in the way required by section 15 of the GIPA Act, which is:

- (a) in a way that promotes the objects of the GIPA Act;
- (b) with regard to any relevant guidelines issued by the Information Commissioner.
- (c) without taking into account the fact that disclosure of information may cause embarrassment to, or a loss of confidence in, the Government (as that fact is irrelevant);
- (d) without taking into account the fact that disclosure of information might be misinterpreted or misunderstood by any person (as that fact is irrelevant); and
- (e) with regard to the fact that disclosure cannot be made subject to any conditions on the use or disclosure of information.

The University has in the last few years dealt with several applications under the GIPA Act for emails relating to COVID-19 research, including an application and email set reviewed in detail by the NSW Civil and Administrative Tribunal in *Kang v University of Sydney* [2022] NSWCATAD 135 (*Kang*). Although these applications did not each seek exactly the same set of emails, the circumstances regarding the information responsive to them and the content of the emails and attachments identified are broadly the same. The University has spent a significant amount of time assessing emails in response to each of these applications, weighing up factors for and against their release and has

consequently built a significant understanding of the content within these emails. For this reason and because of the large number of email chains and attachments identified that are responsive to your application, we did not examine and assess each and every individual email. Rather we applied the public interest test to the results set as a whole.

4.1. Public interest considerations in favour of disclosure

Under section 12(1) of the GIPA Act, there is a general public interest in favour of disclosing government information. Section 12(2) of the GIPA Act sets out some examples of other public interest considerations in favour of disclosure. However, I am not limited to those considerations in deciding your application.

In my view the following public interest considerations in favour of disclosure apply when considering the documents in issue:

- the general public interest in favour of disclosure of government information
- disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government and University transparency and accountability and contribute to positive and informed debate on issues of public importance.

In your original application, you noted that there "... is an overriding public interest in understanding the origin of SARS-COV-2 ...". You have also advised me of your substantial concerns regarding the national and international security risks that could be posed by future pandemics. I have taken your significant concerns in this area into account as additional public interest considerations in favour of disclosure.

4.2. Personal factors of the application

Under section 55 of the GIPA Act I can also take into account any personal factors of your application. I am not aware of any personal factors in your application.

4.3. Public interest considerations against disclosure

When applying the public interest test, the only public interest considerations against disclosure that I can take into account are those set out in the Table at Section 14 of the GIPA Act. To show that they are relevant to the information you asked for, I need to consider whether they could reasonably be expected to have the effect outlined in the Table. I give the words "could reasonably be expected to" their ordinary meaning, that is reasonable, not irrational, absurd or ridiculous.

Public interest considerations against disclosure in the Table at Section 14 which are relevant to the information located to satisfy your application and which apply to the whole of the information responsive to your application are:

Clause 3: Individual rights, judicial processes and natural justice

Clause 3(f) of the Table at section 14 provides:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:

...

(f) expose a person to a risk of harm or serious harassment or serious intimidation, ...

In order to find that this public interest applies, I must be satisfied that release of the information could reasonably be expected to expose a person to intimidation or harassment that is heavy, weighty or grave, and not trifling or transient¹.

Professor Holmes' role in the publication of the genetic sequence for SARS-CoV-2 on Virological on 11 January 2020² is widely known. He has been an author of more than twenty journal articles regarding SARS-CoV-2. A listing of Professor Holmes' publications is included in his staff profile on the University Website³.

It is public knowledge that research regarding the origins of COVID-19 is a matter of international comment and controversy. Subsequently, and like many other scientific researchers⁴ whose work includes SARS-CoV-2, Professor Holmes has been subject to harassment and intimidation. An article in an Australian newspaper alleged without foundation that the China People's Liberation Army had been involved in some of Professor Holmes' research⁵. Since the publication of this article, Professor Holmes has been subjected to hate mail, and online harassment including death threats. In April⁶ and July⁷ 2021 further inflammatory and incorrect statements were published about Professor Holmes and others involved in COVID-19 research. The harassment and threats are continuing. In March this year Professor Holmes was informed by an overseas colleague that (unfounded) rumours were being widely circulated that he was the subject of professional investigation. As a consequence of associated and ongoing harassment, Professor Holmes has ceased responding to social media posts.

I do not suggest that you are party to the unreasonable attacks on Professor Holmes or other scientists researching SARS-CoV-2. However, disclosure under the GIPA Act is in effect disclosure to the public at large and cannot be subject to conditions and restrictions.

For clause 3(f) to be a relevant public interest consideration against disclosure of information, it is sufficient that there is a risk of such harm, harassment or intimidation arising⁸. The meanings of harm⁹, harassment⁷ and intimidation⁸ have all been considered by the NSW Civil and Administrative Tribunal and its predecessor. All are relevant to the experience of Professor Holmes and his colleagues in relation to their research on SARS-CoV-2.

In *Kang*, Senior Member Ransome stated:

The evidence provided by the University in these proceedings shows that there has been serious harassment and intimidation of individuals ... The nature and tenor of the abuse and threats goes well beyond anything to

¹ *AEZ v Commissioner of Police NSW Police Force* [2013] NSWADT 90 at [94], *Pallier v NSW State Emergency Service* [2016] NSWCATAD 293 at [81].

² <https://virological.org/t/novel-2019-coronavirus-genome/319>

³ <https://www.sydney.edu.au/science/about/our-people/academic-staff/edward-holmes.html>

⁴ For example - <https://www.dw.com/en/scapegoats-virologists-face-death-threats-during-coronavirus-crisis/a-53613193>

⁵ <https://www.dailytelegraph.com.au/coronavirus/the-covid-files-australianfunded-coronavirus-paperused-in-chinese-militaryfacility/news-story/7241a6b112816f3951495e0fa52ed2aa> ⁶ Jackson Ryan, "How the coronavirus origin story is being rewritten by a guerrilla Twitter group," CNet, 15 April 2021.

<https://www.cnet.com/features/how-the-coronavirus-origin-story-is-beingrewritten-by-a-guerrilla-twitter-group/#ftag=COS-0510aaa0j>

⁶ GT staff reporters, "Exclusive: Western scientists face government probe, death threats for opposing COVID-19 lab-leak theory: source," Global Times, 5 July 2021. <https://www.globaltimes.cn/page/202107/1227825.shtml> ⁸ *DTB v Commissioner of Police, NSW Police Force* [2019] NSWCATAD 114 (DTB) at [77] ⁹ *DTB* at [79]; see also *EIO v Central Coast Council* [2020] NSWCATAD 230 at [50].

⁷ *DTB* at [80]

⁸ *DTB* at [81].

do with the ordinary scrutiny, discussion and debate of scientific research. The University points out the ongoing discussion of and focus on the origins of SARS-CoV-2 and states that there is no basis for concluding that disclosure of the withheld information would reduce the risk of harassment and intimidation. I agree.⁹

The circumstances regarding the information responsive to both Mr Kang's application and this application are the same and I continue to hold the view confirmed by the Senior Member that disclosure of it would risk significant harassment and intimidation to a University staff member.

The University has a strong duty of care, as well as work, health and safety obligations towards its staff members that require it to act to protect staff, including to act to protect them against harassment or intimidation. In this thinking I am influenced by s19 of the *NSW Work Health and Safety Act 2011*, which states that employers have a primary responsibility to 'ensure, so far as is reasonably practicable, the health and safety of workers engaged'.

Given the history of serious intimidation and harassment, and the continuing global discussions and debate about the origins of COVID-19, it is reasonable to expect that disclosure of the requested information would expose a person to a risk of harm or serious harassment or serious intimidation. Therefore, clause 3(f) is a relevant public interest consideration, and it is appropriate to take it into account when determining whether there is an overriding public interest against its disclosure.

Clause 4: Business interests of agencies and other persons

Clauses 4 (d) and (e) of the Table at section 14 provide:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:

...

(d) prejudice any person's legitimate business, commercial, professional or financial interests

(e) prejudice the conduct, effectiveness or integrity of any research by revealing its purpose, conduct or results (whether or not commenced and whether or not completed). ..."

The requested information contains confidential and personal information relating to research and the publication of research findings that is not public. This information includes the private pre- and post-publication communications of researchers about their work, and the context in which the work was conducted. It also includes tentative views, opinions and commentary not intended for publication or wider distribution. It has been treated as confidential by the academics involved and by the University. Due to its potential impact on their professional positions and reputations, disclosure of the requested information could reasonably be expected to prejudice the professional interests of the researchers for the purposes of clause 4(d) of the Table at section 14 of the GIPA Act. Accordingly, it is appropriate to take this public interest consideration into account when determining whether there is an overriding public interest against disclosure. As with the previous considerations against disclosure, Mr Kang's case dealt with similar information subject to 4(d) (described as Items 1-6). Senior Member Ransome stated:

The information in Items 1-6 similarly concerns academics active within the field of research on SARS-CoV-2. In my view, in light of the nature of the information and the context within which the communications were made, to use the words of the Tribunal in Leech, it is not "purely speculative, fanciful, imaginary or contrived"

⁹ [2022] NSWCATAD 135 at [92]

to consider that the legitimate professional interests of the writers of the communication could be affected by the disclosure of Items 1-6.¹⁰

Clause 4(e) of the Table is a relevant public interest consideration against disclosure if disclosure could be reasonably expected to prejudice the conduct, effectiveness or integrity of research by revealing its purpose, conduct or results. This consideration applies whether or not the research has commenced or been completed. Collaborative research, particularly research with international colleagues, relies on free communication of ideas, opinions, evidence and information. Hypotheses are presented, assessed and, if unsuitable, discarded. To have all such correspondence subject to international public scrutiny could reasonably be expected to negatively impact the collaborative relationships between researchers and prejudice the future conduct of such research.

Again, the decision in *Kang* is relevant, with Senior Member Ransome stating:

I accept the University's argument that reducing access by international academics to the research being conducted in China could reasonably be expected to decrease, rather than increase, long-term transparency in scientific research. I am satisfied that it is appropriate for me to take the public interest consideration set out in cl 4(e) into account when determining whether there is an overriding public interest against disclosure of the information in Items 1-8.¹¹

Accordingly, I consider that the public interest consideration against disclosure in clause 4(e) applies to the email messages, and that it is appropriate to take it into account when determining whether there is an overriding public interest against disclosure.

Clause 1: Responsible and effective government

Clause 1(f) of the Table provides:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects (whether in a particular case or generally):

...

(f) prejudice the effective exercise by an agency of the agency's functions,

...

Subsection 6(1) of the *University of Sydney Act 1989* sets out the object of the University:

The object of the University is the promotion, within the limits of the University's resources, of scholarship, research, free inquiry, the interaction of research and teaching, and academic excellence.

The University's principal functions for the promotion of its object include in subsection 6(2) of the Act:

- (b) the encouragement of the dissemination, advancement, development and application of knowledge informed by free inquiry*
- (c) the provision of courses of study or instruction across a range of fields, and the carrying out of research, to meet the needs of the community,*
- (d) the participation in public discourse*

Professor Holmes is employed by the University as ARC Australian Laureate Fellow in the University's Faculties of Science and Medicine and Health. The Australian Research Council website states that:

¹⁰ [2022] NSWCATAD 135 at [98]

¹¹ [2022] NSWCATAD 135 at [104]

*The Australian Laureate Fellowships scheme reflects the Australian Government's commitment to excellence in research by supporting world-class researchers to conduct research in Australia*¹² Professor Holmes' public biography summaries his career as follows:

*Professor Eddie Holmes is known for his work on the evolution and emergence of infectious diseases, particularly the mechanisms by which RNA viruses jump species boundaries to emerge in humans and other animals. He currently holds an ARC Australian Laureate Fellowship. He moved to the University of Sydney in 2012. He has studied the emergence and spread of such pathogens as SARS-CoV-2, influenza virus, dengue virus, HIV, hepatitis C virus, myxoma virus, RHDV and Yersinia pestis. His previous appointments include Verne M. Willaman Chair in the Life Sciences at the Pennsylvania State University, USA, and Affiliate Member of the Fogarty International Centre (2005-2012), National Institutes of Health, USA. From 1999-2004 he was Fellow of New College, Oxford. He is also an Honorary Visiting Professor at Fudan University, Shanghai. In 2021 he received the (Australian) Prime Minister's Prize for Science. He is the author of 691 peer-reviewed papers and two books. His publications have >116,000 citations (h-index of 156, i10-index of 649; ...*¹³

Professor Holmes' work contributes to a primary function of the University, being the carrying out of research, to meet the needs of the community. Details of his research, teaching, publications and awards are published on the University's website. His work also contributes to the research functions, and thereby object, of the university. As noted above, Professor Holmes was awarded the Prime Minister's Prize for Science¹⁴. The citation for this award includes the following:

In early 2020, Professor Holmes was the first person in the world to publicly share the genome sequence of COVID-19. Sharing this data was critical in helping the global response to the pandemic. It fast-tracked research efforts around the world and enabled work on designing a vaccine to begin within days, saving countless lives.

¹⁵.

As it is reasonable to expect that disclosure of the requested information would expose a person to a risk of harm or serious harassment or serious intimidation it is reasonable to expect that such harassment and intimidation would have a negative effect on research. Therefore, clause 1(f) is a relevant public interest consideration, and it is appropriate to take it into account when determining whether there is an overriding public interest against its disclosure.

4.4. Consultation

The information you requested included the personal information and the business, commercial, professional and financial information of third parties. However, consultation with them under section 54 of the GIPA Act was not undertaken. I had formed the view that consultation was not required because the information was not to be released in light of the other significant public interest considerations against disclosure.

4.5. Balancing the public interest test

The object of the GIPA Act, as set out in section 3, is:

In order to maintain and advance a system of responsible and representative democratic Government that is open, accountable fair and effective, the object of this Act is to open government information to the public ...

¹² <https://www.arc.gov.au/funding-research/funding-schemes/discovery-program/australian-laureate-fellowships>

¹³ <https://www.sydney.edu.au/science/about/our-people/academic-staff/edward-holmes.html>

¹⁴ <https://www.pmc.gov.au/news-centre/government/2021-prime-ministers-prizes-science>

¹⁵ <https://www.industry.gov.au/publications/prime-ministers-prizes-science-2021/2021-prime-ministers-prize-science>

This objective is to be achieved by authorising and encouraging proactive release of information, providing an enforceable right of access and restricting access to government information only where

there is an overriding public interest against disclosure. In accordance with section 13, there is an overriding public interest against disclosure of information for the purposes of the GIPA Act if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.

I have considered the relevant public interest considerations in favour of, and against the disclosure of, the government information that you have requested. The public interest considerations in favour of disclosure of the information requested are set out in section 4.1 above. The public interest considerations against disclosure of the information requested are set out in section 4.3.

I have formed the view that disclosure of the requested information could reasonably be expected to have one or more of the relevant effects listed in the Table at section 14 of the GIPA Act. Accordingly, it is appropriate to take these public interest considerations into account when assessing whether there is an overriding public interest against disclosure.

I give reasonable weight to the considerations in favour of disclosure, particularly to the consideration that disclosure would contribute to positive and informed debate on issues of public importance and might assist a better understanding the origin of SARS-COV-2.

In relation to consideration 3(f) in the table, it is my view that the level of risk of harm or serious harassment that a person may be exposed to if the requested information were to be disclosed would be heavy, weighty or grave and not trifling or transient. I have given this consideration significant weight and have formed the view that it outweighs the presumption in favour of disclosure.

I have also given significant weight to the fact that information regarding the research conducted by Professor Holmes and his peers is published in relevant scientific journals, is peer reviewed and is available online to any individual or organisation wishing to access it. I consider that, in this way the public interest in the disclosure of government information regarding the research has been met.

Taking into account all the relevant factors, I am satisfied on balance that the public interest considerations against disclosure set out in part 4.3 of the Notice outweigh the public interest considerations in favour of disclosure of the requested information. In particular, the public interest considerations in favour of disclosure (whether taken individually or cumulatively) do not outweigh the public interest in the University:

- a) protecting individuals from the risk of harm or of serious harassment or serious intimidation
- b) preserving the University's ability to effectively conduct collaborative research in the future
- c) exercising its functions by carrying out research to meet the needs of the community
- d) protecting individuals' professional interests.

In coming to my decision, I have taken into account that the University is prohibited by section 73(1) of the GIPA Act from imposing any conditions on the use or disclosure of information when the agency provides access to the information. I have taken into account that release of information under the GIPA Act is effectively 'release to the world'.

I have considered section 73(2) of the GIPA Act, which allows the University to impose a condition on how a right of access may be exercised, if the condition would avoid there being an overriding public

interest against disclosure of the information. However, I am of the view that the imposition of a condition on access, such as inspection rather than providing a copy of the information, would not avoid an overriding public interest against disclosure.

I have decided under section 58(1)(d) to refuse to provide access to the information because there is an overriding public interest against its disclosure.

5. Disclosure log

Under section 25 of the GIPA Act an agency is required under specified conditions to record in its disclosure log information relating to access applications. As no information is released by this decision, details of your application will not be recorded in the University's disclosure log.

6. Review rights

If you disagree with any of the decisions in this notice that are reviewable, you may seek a review under Part 5 of the GIPA Act. Before you do so, I encourage you to contact me to discuss your concerns. My contact details are set out below.

You have three review options:

- internal review by another officer of this agency, who is no less senior than me
- external review by the Information Commissioner, or
- external review by the NSW Civil and Administrative Tribunal (**NCAT**).

You have 20 working days from the date of this Notice to apply for an internal review. If you would prefer to have the decision reviewed externally, you have 40 working days from the date of this Notice to apply for a review by the Information Commissioner or the NCAT.

To assist you, I have enclosed a fact sheet published by the Information and Privacy Commission (**IPC**), *Your review rights under the GIPA Act*. You will also find some useful information and frequently asked questions on the IPC's website: www.ipc.nsw.gov.au.

You can also contact the IPC on freecall 1800 IPC NSW (1800 472 679).

7. Further information

If you have any questions about this notice or would like any further information, please contact me at gipa.enquiries@sydney.edu.au



Dr Kate Cumming
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